Filed 3/9/10 In re Eduardo R. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re EDUARDO R., a Person Coming Under the Juvenile Court Law.	B214072 (Los Angeles County Super. Ct. No. MJ17216)
THE PEOPLE, Plaintiff and Respondent, v. EDUARDO R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Christopher G. Estes, Judge. Modified and affirmed.

Courtney M. Selan, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Eduardo R., age 17 at the time of the petition, appeals from the order of wardship (Welf. & Inst. Code, § 602; undesignated section references are to that code), rendered after the juvenile court found he had committed robbery (Pen. Code, § 211). The court ordered appellant home on probation with his parents and directed that he perform 40 hours of community service.

Appellant contends that the disposition order's statement of a maximum possible time in physical custody should be stricken, because unauthorized by section 726, subdivision (c), and that his adjudication of committing robbery cannot lawfully constitute a "strike" (Pen. Code, §§ 667, subds. (b)-(1), 1170.12) for purposes of sentencing in future cases. As respondent agrees, appellant's first contention is correct, and requires modification of the disposition order. Appellant's second contention, however, is hypothetical and, as he now acknowledges, runs contrary to recent California Supreme Court authority. Accordingly, we strike the specification of maximum custody, and affirm the order of wardship as modified.

FACTS

Appellant does not challenge his adjudication of guilt, and therefore it is unnecessary to detail the evidence. Suffice it to say the evidence showed that on May 6, 2008, appellant and another minor approached two brothers ages 17 and 14, who were walking home from school in Palmdale, and robbed them of their cell phones and an iPod. The victims subsequently identified appellant's photo in a high school yearbook and in a sheriff's department photo display, as well as at the adjudication hearing.

As previously stated, the trial court ordered appellant home on probation, in the custody of his parents. The minute order specified that appellant could not be held in physical confinement for more than 5 years. After pronouncing the disposition, the court admonished appellant that his adjudication of robbery would constitute a strike, requiring doubling of sentence should appellant be convicted of a felony.

DISCUSSION

Appellant first contends that the disposition order's statement of a maximum possible term of physical confinement was erroneous, primarily because such a specification is authorized and required only when the court orders the minor removed from parental custody, which the court did not do here. That is what section 726, subdivision (c) provides.[1] In *In re Matthew A.* (2008) 165 Cal.App.4th 537, this division faced an identical situation. We ordered the term of maximum confinement stricken, observing that "[t]he criticism of this practice in prior opinions without actually ordering a correction of the disposition seems to have had little effect." (*Id.* at p. 541.) In its brief, "[r]espondent joins appellant in his request that the term be stricken." We agree, and will do so.

As originally framed, appellant's second contention was that his adjudication of robbery, although satisfying the statutory requisites of a strike (Pen. Code, §§ 667, subd. (d)(3), 1172.12, subd. (b)(3)), could not constitutionally be one, because the court and not a jury had been the factfinder. Appellant relied principally on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, and its progeny, including *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194-1195. He requested that this court so declare.

Subsequently, in *People v. Nguyen* (2009) 46 Cal.4th 1007, our Supreme Court rejected the constitutional contention appellant espouses. Appellant presently acknowledges that *Nguyen* controls here. Moreover, appellant's effort to obtain an adjudication as to the future "strike" consequences of his present adjudication is premature, and unripe. (Accord, *In re Travis W.* (2003) 107 Cal.App.4th 368, 378.)

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[1] The subdivision provides in part: "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court."

DISPOSITION

The specification of maximum confinement is stricken. As so modified, the order of wardship is affirmed.

LICHTMAN, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.